DATE: April 20, 1999

CASE NO: 1998-INA-209

In the Matter of

W.G. INGALLS COMPANY
Employer

on behalf of

VICTOR DE LA CRUZ
Alien

Appearances: Gary H. Manulkin, Esq., Attorney for Employer and Alien

Certifying Officer: Rebecca Marsh Day, Region IX

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from W.G. Ingalls Company's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On January 31, 1995, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the California Employment Development Department ("EDD") on behalf of the Alien, Victor De La Cruz. (AF 21-22). The job opportunity was listed as "Quality Control Inspector-Conveyors". (AF 21). The job duties were described as follows:

> Inspect product and provide information to employer as to finished conveyor's quality. Suggest improvement in defective workmanship. Report defective work to various section foreman to inform employer as to proper amended procedures to solve problem-causing defect. Inform [e]mployer regarding number of defective conveyors. Work with employer on solving any customer complaints. Trouble-shoot any defective parts and recommend alternative parts replacement.

(Id.). The stated job requirements for the position, as set forth on the application, are 2 years experience in the job offered or in the related occupation of Conveyor Belt Mechanic. In addition, the Employer required verifiable references.

The EDD sent the Employer a Recruitment Notice on September 1, 1995, notifying the Employer that the publication recommended by the Department of Labor ("DOL") for the daily publication of the job advertisement is the Los Angeles Times (city edition). (AF 84). On October 4, 1995, the Employer submitted advertisement tear sheets from the "Valley Tribune" along with documentation regarding the circulation of the San Gabriel Valley Publishing Company. (AF 73-79). On November 20, 1995, the EDD transmitted the resumes of 5 U.S. applicants to the Employer. (AF 65-68). According to the Employer's Results of Recruitment Report, none of the applicants was hired. (AF 28-29).

The CO issued a Notice of Findings ("NOF") on October 28, 1997, proposing to deny certification for three reasons. (AF 15-19). The first ground was that the Employer's recruitment failed to adequately test the labor market. The CO found that the Employer was advised to use the Los Angeles Times to advertise the job opening, but advertised in the "TNG" instead, documenting

that it has the larger circulation. The CO stated:

> [Y]ou present no evidence to show Pico Rivera is a discrete labor market entire unto itself. Rather, the census bureau has designated the entire Los Angeles county as a Metropolitan Statistical Area and the labor market to be tested. The "TNG" only circulates in a small corner of the market; your use of it has not adequately tested the necessary labor market.

(AF 16). The CO notified the Employer that if it decided neither to re-recruit nor to provide substantial documentation that the source used is the most likely to bring responses from able, willing, and available U.S. workers in the labor market, then the certification would likely be denied for failure to adequately test the labor market. Second, the CO found that the requirement of two years experience in the job offered or as a "Conveyor Belt Mechanic" does not appear to be the true minimum requirements in that at the time the alien was hired, he did not meet the requirements and the Employer trained him or provided the necessary learning opportunities after he was hired. (AF 17). Third, the CO found that the Employer rejected U.S. workers for non lawful job-related reasons and failed to conduct a good-faith recruitment effort. (AF 18).

The Employer submitted its rebuttal on November 20, 1997. (AF 4-14). The Employer stated that Pico Rivera is part of the San Gabriel Valley which is "a discreet labor market entire unto itself" as evidenced by the circulation maps presented on the newspapers market areas. (AF 6). The Employer further argued that this newspaper is used by its company and other companies in the area to find applicants for job openings. To document this assertion, the Employer referred to the tear sheets as evidence that there are other advertisements for job openings in industrial employment and noted that there were 5 applicants for the position which is evidence that it is a viable source for recruitment in this area. (Id.). The Employer's attorney referred the CO to Burton Way Motors, 94-INA-478 (July 20, 1995) and Computech International, 94-INA-43 (Feb. 26, 1996) as "legal proof that this newspaper is an acceptable recruitment source." (Id.). With regard to the issue of minimum requirements, the Employer chose to retain the experience requirement and argued that the occupation in which the Alien was hired is dissimilar from the occupation for which it is seeking labor certification. (AF 7). The Employer explained that the Alien gained his experience as a "Conveyor Belt Mechanic" which is distinctly different position than that of a "Quality Control Inspector" which was a newly created position for which the Alien was the first to hold. (Id.). In addition, the Employer argued that because the requirements were not restrictive, the U.S. applicant was rejected for lawful, job-related reasons and all U.S. applicants were contacted on a timely basis. (AF 8).

On February 25, 1998, the CO issued a Final Determination ("FD") denying certification for two reasons. (AF 3-3a). First, the CO found that the Employer did not adequately test the labor market by advertising the job opening in the "TNG". (AF 3a). The CO stated that:

> First of all, the materials you submit from the "TNG" say nothing about the San Gabriel being a "discrete labor market". Second, you did not describe in detail which ads you consider to be "industrial employment". And last, you rejected three of the

> five applicants as not qualified and found the other two not available, which actions don't sustain the argument your ad in the "TNG" adequately tested the labor market.

(Id.). Second, the CO found that the Employer had failed to offer its minimum requirements as it has not offered U.S. applicants the same terms and conditions of employment as it offered the alien. In addition, the CO found that the Employer created the position for the Alien and was not likely to hire U.S. workers to replace him. (Id.).

On March 11, 1998, the Employer submitted a Request for Review of a Denial of Certification. (AF 1-2). The Employer argued again that the newspaper used had a wide circulation in the area of intended employment. The Employer also argued that the CO stated for the first time in the FD the findings that the job was created for the alien and that the Employer had not offered U.S. applicants the same terms and conditions of employment as it offered the alien. (AF 2). The file was forwarded to the Board for review on May 21, 1998.

Discussion

Section 656.21(g) requires an employer to advertise its job opportunity "in a newspaper of general circulation or in a professional, trade, or ethnic publication, whichever is appropriate to the occupation and most likely to bring responses from able, willing, qualified, and available U.S. workers." If the CO asserts that the employer advertised in an inappropriate publication, the employer has the burden to establish in rebuttal that the CO's determination of inadequate advertisement was in error and that the publication selected by the employer was most likely to bring responses as required by section 656.21(g). Peking Gourmet, 88-INA-323 (May 11, 1989) (en banc). The CO, however, does not have unbridled discretion and should not require additional advertising or recruiting without offering a reasonable explanation of why the employer's advertisements and/or recruitment were inadequate and how the additional recruitment efforts recommended by the CO would be appropriate. Intel Corporation, 87-INA-570 and 87-INA-571 (Dec. 11, 1987) (en banc); Computech International, 94-INA-43 (Feb. 26, 1996). Once an employer has met the prima facie requirements of section 656.21(g) by advertising in a newspaper or trade journal and explaining why that publication is most appropriate media for the position, the burden shifts to the CO to explain why another newspaper would be more appropriate and more likely to attract qualified candidates. Amendola Music, 93-INA-310 (July 26, 1994); Pater Noster Highschool, 88-INA-131 (Oct. 17, 1988).

In this case, the Employer was notified initially by the EDD that the DOL recommends the Los Angeles Times (City Edition) for the daily publication in the Employer's geographical location. (AF 84). The Employer, however, chose to advertise instead in the San Gabriel Valley Tribune, a newspaper with a larger circulation, than the Los Angeles Times, in the San Gabriel Valley. In the NOF, the CO pointed out that the Employer has advertised in a newspaper that circulates only in a small corner of the labor market and therefore has not adequately tested the market. The Employer argues that where two newspapers may overlap in one geographic area, a CO cannot use the size of

the circulation as the sole criterion to test which newspaper is most likely to bring responses, citing Burton Way Motors, 94-INA-478 (July 20, 1995) and Computech International, supra.

The issue here, however, is not one in which there are two papers, both of general circulation, and the CO has chosen one paper over the other for the sole reason that the one paper has a larger circulation. The issue here, rather, is whether it is a violation of section 656.21(g) for the Employer to advertise in a local newspaper with a circulation which excludes a number of possibly qualified and available U.S. workers residing in the Los Angeles Metropolitan Statistical Area ("MSA").

The newspaper chosen by the Employer does not reach the entire Los Angeles County, but rather only extends through out the San Gabriel Valley. The Employer asserts that the San Gabriel Valley is a discreet labor market entire unto itself evidenced by the fact that it has a larger circulation in the area of employment. The evidence that the San Gabriel Tribune has a larger circulation than the Los Angeles Times (City Edition) in the San Gabriel Valley does not prove that this area is a discrete labor market. Although we find that the tear sheets for the Employer's advertisements show that other employers have advertised for industrial employment job openings, we do not find this factor along with the fact that there were 5 applicants for the position, to be enough to outweigh the fact that the Employer has only advertised in a small corner of the labor market. The Employer has provided no explanation for why they chose not to advertise in all of Los Angeles County except for the statement that "we do not feel that [the Los Angeles Times] are the best source for recruitment in the San Gabriel Valley." (AF 6).

The CO explained that the Census Bureau has designated the entire Los Angeles county as the MSA and the labor market to be tested. By advertising in the San Gabriel Tribune, the Employer excluded a number of U.S. workers residing in the Los Angeles MSA. Since we agree with the CO that the Employer failed to adequately recruit for the position, it is unnecessary to address the issue of whether the Employer failed to offer the actual minimum requirements. Accordingly, the CO properly denied certification. See Amendola Music, 93-INA-310 (July 26, 1994).

Order

The Certifying Officer's denial of labor certification is affirmed.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California